Selected Recent Decisions under Title I of the ADA and Section 501 of the Rehabilitation Act

I. Applying the ADA Amendments Act

A. Retroactivity - ADAAA

Strolberg v. U.S. Marshals Serv., 2010 WL 1266274 (D. Idaho Mar. 25, 2010). Rejecting plaintiff's argument that under Jenkins v. National Board of Medical Examiners, 2009 WL 331638 (6th Cir. Feb. 11, 2009), the ADAAA standards apply retroactively to injunctive relief claims even if not to compensatory and punitive damages, the court ruled that Jenkins merely stands for the proposition that the ADAAA standards can be applied in a case involving prospective relief that will govern conduct to take place after the effective date of the ADAAA. In this case, plaintiffs sought injunctive relief in the form of reinstatement to remedy terminations that occurred prior to the effective date of the new law. By contrast, plaintiff in Jenkins sought the remedy of accommodation for an event – a national medical licensure examination – that was to occur after the effective date of the new law.

EEOC v. Argo Distribution, L.L.C., 555 F.3d 462 (5th Cir. 2009). The court noted, without analysis, that the changes made by the ADA Amendments Act do not apply retroactively, citing language from Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) ("Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the 'corrective' amendment must clearly appear.").

Jenkins v. National Bd. of Med. Examiners, 2009 WL 331638 (6th Cir. Feb. 11, 2009) (unpublished). In a non-employment ADA accommodation case, a third-year medical student with dyslexia sought extra time to take the national medical licensing examination. The court held that the ADA Amendments Act applies to cases pending on its effective date where the relief sought is only prospective in nature (i.e., a reasonable accommodation) rather than damages for past conduct. Although the initial accommodation request was made and denied prior to the effective date of the Amendments Act, the court found that since the relief sought was limited to prospective injunctive relief (extra time on the test when it is administered in the future), the Amendments Act standards should be applied in determining whether plaintiff's dyslexia met the ADA definition of disability.

Milholland v. Summer County Bd. of Educ., 569 F.3d 562 (6th Cir. 2009). The court held that the ADA Amendments Act did not apply retroactively in a case where the conduct at issue occurred before the Act's January 1, 2009 effective date. The court stated that while Congress expressly stated its intent to overrule Sutton and "reinstat[e] a broad scope of protection to be available under the ADA," Congress's intent to "restore" prior protections "does not, by itself, reveal whether Congress intend[ed] the 'overruling' statute to apply retroactively." Relying on Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994), and Landgraf v. USI Film Products, 511 U.S. 244 (1994), the court held that "[a]lthough in many situations 'a court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that

gave rise to the suit,' there is nonetheless a 'well-settled presumption against application of . . . new statutes that would have genuinely 'retroactive' effect.'" Like the Title VII amendments at issue in Landgraf, retroactive application of the ADA Amendments Act would attach new legal consequences or increase a party's liability as to events that were completed before its enactment. "Application of these principles compels the conclusion that the ADA Amendments Act does not apply to pre-amendment conduct."

Becerril v. Pima County Assessor's Office, 587 F.3d 1162 (9th Cir. 2009). In affirming summary judgment for the employer on disparate treatment and denial of accommodation claims brought by a county worker who alleged that her impairment (temporomandibular disorder) was aggravated when she was transferred to a more stressful section of her office, the court ruled that the Amendments Act did not apply retroactively. The court reasoned: "We do not apply statutes retroactively absent clear congressional intent favoring such a result," and the ADAAA did not express such an intent. Citing decisions by the Fifth, Sixth, Seventh, and District of Columbia circuits, the court concluded that the ADAAA does not apply retroactively.

Lytes v. D.C. Water & Sewer Auth., 572 F.3d 936 (D.C. Cir. 2009). The court held that by adopting a delayed effective date for the Amendments Act (it was signed into law on September 25, 2008, with a stated effective date of January 1, 2009), Congress indicated its intent that the statute only apply prospectively. "[W]e can imagine no reason for the Congress to have delayed the effective date other than to give fair warning of the Amendments to affected parties and to protect settled expectations."

Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850 (9th Cir. 2009). Applying the definition of "disability" under the ADA as originally passed, the court held that plaintiff, who had insulin dependent type-2 diabetes, was an individual with a disability. The court stated that because plaintiff had a disability under the ADA as originally passed, it was unnecessary to determine whether the ADA Amendments Act is retroactive. The court stated that it was nevertheless appropriate to include a brief discussion of the Amendments Act because the Act "sheds light on Congress' original intent when it enacted the ADA." Noting that the Act calls for a broad construction of "disability" and alters Supreme Court holdings, the court concluded that "the original congressional intent as expressed in the amendment bolsters [its] conclusions."

B. "Substantially Limiting" Impairment Under ADAAA

Gil v. Vortex, L.L.C., 2010 WL 1131642 (D. Mass. Mar. 25, 2010). Plaintiff, a punch press operator who was completely blind in one eye, brought claims under the ADA challenging his employer's requirement that he provide two doctor notes and submit to an independent medical examination to verify his ability to work without incident, and his subsequent termination due to the employer's fears that he might injure himself. Contending that plaintiff's allegations were insufficient to plead disability even under the ADAAA standards, the employer moved to dismiss. Denying the motion, the court held that even though the complaint was devoid of any references to "substantial limitations" resulting from plaintiff's monocular vision, enough had been "pled to satisfy the relaxed disability standard of the Amendments Act." Moreover, with respect to satisfying the new ADAAA "regarded as" standard, the court ruled that the facts

established a plausible allegation that the employer believed plaintiff to be disabled and terminated him as a result. In reaching this conclusion, the court noted that the employer asked plaintiff for medical verification of his ability to work without incident, that he was terminated when the employer believed he was unable to obtain this verification, and that plaintiff's supervisor told plaintiff's daughter that plaintiff was discharged because of the employer's fears that he would injure himself.

Horgan v. Simmons, 2010 WL 1434317 (N.D. Ill. Apr. 12, 2010). Plaintiff, who had been diagnosed as HIV-positive for 10 years but kept his status confidential, had been a sales manager for the employer since 2001. Stating that he was "worried" about plaintiff, the company president met with plaintiff in July 2009 and demanded to know whether plaintiff was having medical problems. Plaintiff ultimately disclosed his HIV-positive status but stated that it did not affect his ability to do his job. Plaintiff alleged that the president urged him to tell his family about his condition; asked him "how he could ever perform his job with his HIV positive condition and how he could continue to work with a terminal illness"; and told him he did not believe that plaintiff "could lead if the employees knew about his condition." According to plaintiff, the president then told him to leave the plant immediately, and he was terminated the next day. Plaintiff sued under the ADA, alleging that he was subjected to both discriminatory termination and an impermissible disability-based inquiry. Moving to dismiss, the employer contended that HIV infection does not always substantially limit a major life activity and that plaintiff could not meet the definition of disability. Denying the motion, the court noted that the ADAAA made clear that the immune system function is a "major life activity." In adopting the ADAAA, Congress also made clear its intent that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and thus "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." The court concluded that it was "certainly plausible – particularly, under the amended ADA – that Plaintiff's HIV positive status substantially limit[ed] a major life activity: the function of his immune system" and stated that this conclusion was "consistent with the EEOC's proposed regulations to implement the ADAAA which list [at section 1630.2(j)(5)] HIV as an impairment that will consistently meet the definition of disability."

Sulima v. Tobyhanna Army Depot, 602 F.3d 177 (3d Cir. 2010). Plaintiff, a former employee of a federal contractor, alleged he was transferred and then laid off because he was disabled or regarded as disabled, or in retaliation for requesting accommodation. (See page 19 for discussion of retaliation claim.) He alleged that the side effects of medications he took to treat his obesity and sleep apnea had created the impairment at issue. The court ruled that under the ADA, both pre- and post-Amendments Act, the definition of disability can encompass an impairment resulting solely from the side effects of medication, but "this category of disability claims is subject to limitation." The medication or course of treatment must not only have been prescribed or recommended by a licensed medical professional, but also "must be required in the 'prudent judgment of the medical profession,' and there must not be an available alternative that is equally efficacious that lack lacks similarly disabling side effects." (citation omitted). "The concept of 'disability' connotes an involuntary condition, and if one can alter or remove the 'impairment' through an equally efficacious course of treatment, it should not be considered 'disabling.'"

C. "Regarded as" Under ADAAA

Wurzel v. Whirlpool Corp., 2010 WL 1495197 (N.D. Ohio April 14, 2010). Plaintiff, a materials handler whose job entailed driving a tow motor to deliver items throughout the Whirlpool plant, was diagnosed with prinzmetal angina, which causes coronary spasms without warning. Because of increasingly frequent episodes of tightness in the chest, shortness of breath, dizziness, left arm numbness, and fatigue, plaintiff sought help from the employee health center and took intermittent leave. The company doctor deemed plaintiff unqualified to drive the tow motor, and plaintiff was transferred to a position in the paint department. Based on subsequent medical reviews, the company concluded that plaintiff could not perform the paint position safely either, as it required in part working on a low-hanging conveyor line that moved continuously and one rotation required working alone outside of the presence of other employees. He was placed on mandatory sick leave pending either bidding successfully on another position that he could perform safely or being spasm-free for six months. The court granted summary judgment for Whirlpool on plaintiff's disability discrimination claim challenging the mandatory leave. Because the events in question began before the effective date of the ADA Amendments Act (ADAAA) but continued after that date, the court analyzed coverage under both the pre- and post-ADAAA standards. Applying the ADAAA "regarded as" standard, the court ruled that plaintiff was not subjected to an action prohibited under the ADA "because of an actual or perceived physical or mental impairment," since he posed a direct threat to safety. "[A] rational jury could only find that concerns with plaintiff's own safety and that of his co-workers promoted Whirlpool's decisions. Actions motivated by bona fide concerns with worker safety cannot be deemed or found to be prohibited under the ADA, as amended or otherwise." The court stated that it was the consequences of plaintiff's condition, not the condition itself, which motivated the employer's decision.

George v. TJX Cos., 2009 WL 4718840 (E.D.N.Y. Dec. 9, 2009). Plaintiff, a back room associate at a retail store whose position entailed lifting, stacking, and processing approximately 400 to 450 boxes of merchandise per day, was terminated after abandoning his position, in part, according to plaintiff, because of how he was treated by the company when he sustained a fractured upper arm. Granting summary judgment for the employer on plaintiff's claims of disparate treatment and denial of accommodation, the court found that the ADAAA did not apply retroactively but nevertheless noted that plaintiff could not meet the amended definition of "regarded as." The ADAAA does "not apply to impairments that are transitory and minor" and defines "transitory" as an impairment with an actual or expected duration of six months or less. Because the record evidence "overwhelmingly support[ed] the inference that plaintiff's impairment lasted only two months," plaintiff "presented no evidence to dispute that [the employer] saw him as having a temporary injury without permanent or long-term impact."

Powers v. USF Holland, Inc., 2010 WL 1994833 (N.D. Ind. May 13, 2010). While holding that ADA Amendments Act does not apply retroactively to the claims at issue, the court explained that even if the Amendments Act did apply, plaintiff would not be able to prove he is qualified because he argued that he was an "individual with a disability" solely under the "regarded as" prong, yet needed an accommodation in order to be qualified. The ADA as amended, 42 U.S.C.

§ 12201(h), states: "[a] covered entity… need not provide a reasonable accommodation… to an individual who meets the definition of disability in section 12102(1) … solely under subparagraph (C)…." "By excluding the requirement to accommodate individuals who are only regarded as disabled, the ADAAA recognizes the obvious: if an individual is not actually disabled, then he or she does not need the accommodation in the first place. Thus, while an employer may not discriminate against persons it perceives as disabled, the law does not impose a duty on that employer to accommodate what turns out to be a fictional impairment."

II. "Qualified"

Richardson v. Friendly Ice Cream Corp., 594 F.3d 69 (1st Cir. 2010). Plaintiff argued that she was qualified because she could still perform administrative duties of her job as a restaurant assistant manager notwithstanding her physical restriction, and any manual tasks she could not perform were merely marginal functions. Rejecting this argument, the court ruled that due to the limited number of restaurant employees available on certain shifts, plaintiff's essential functions included not just supervising the kitchen staff an servers, but also assuming duties such as preparing food and serving when needed. Plaintiff's own testimony and other evidence showed that plaintiff was often required to perform a wide range of manual duties, including unloading supply deliveries, operating the grill and deep-frying machine, and cleaning. Moreover, at certain times of the day only an assistant manager and a server were working at the restaurant, making it necessary for the assistant manager to serve food or to prepare food while the server interacted with customers. In filing for and receiving worker's compensation, plaintiff claimed that her severe shoulder injury resulted from her repetitive performance of many of these manual duties. Finally, the court rejected the argument that the employer's decision to temporarily exempt plaintiff from performing certain manual tasks indicated that they were not essential functions of her position. The court held that plaintiff's experience performing a wide range of manual job duties indicated that these duties were essential functions of her assistant manager position.

Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850 (9th Cir. 2009). Because of his diabetes, plaintiff no longer could do the strenuous field work required during an outage. A company doctor concurred, but opined that this restriction did not prevent plaintiff from performing his "essential functions." The court vacated summary judgment for the employer based, in part, on genuine issues of material fact as to whether it was an essential function for a welding metallurgy specialist to work in the field when a power outage occurred. Plaintiff, who had insulin-dependent type 2 diabetes, claimed that he spent most of his time working in an office. Over the course of a 23-year career, plaintiff had to be sent to handle a power outage about 12 times. During such occasions, he might have to work 10 to 12 hours a day, seven days a week, but he had not received such an assignment since at least 2001, and major outages were becoming increasingly infrequent.

Hennagir v. Utah Dep't of Corr., 587 F.3d 1255 (10th Cir. 2009). Affirming summary judgment for the employer, the court held that emergency response training was an essential function for all physician's assistants at the state correctional institution because of the possible consequences if such employees could not handle an emergency. Plaintiff had successfully

worked, without incident, in such a position for several years before the state adopted a new requirement that all medical personnel having contact with inmates receive emergency response training. Plaintiff was unable to meet this requirement because of her disabilities and was eventually terminated. The court held that employers are free to change the essential functions of a position, so the fact that plaintiff was originally hired and worked for several years without this requirement did not prevent the employer from implementing a new essential function. While plaintiff and many of her colleagues were never involved in a violent incident with an inmate, another medical employee was attacked, thus underscoring the employer's argument that the nature of the work presented the potential for a physical confrontation with an inmate on a daily basis and that the inability to respond could have serious consequences.

DeRosa v. National Envelope Corp., 595 F.3d 99 (2d Cir. 2010). A customer service representative with venous insufficiency due to a traumatic injury to his leg was permitted to telework for two years as an accommodation. A new chief executive rescinded the accommodation, and terminated the employee when he was unable to work without it. The employer argued that plaintiff was not qualified because he had stated on a New York disability benefits form that he was "no longer able to speak on [the] phone or work with [a] computer [due] to pain," and the essential functions of his job included speaking on the phone and typing on a computer. Vacating summary judgment for the employer, the court ruled that plaintiff was not estopped from asserting that he was a qualified individual with a disability, despite his statements on the disability benefits application, because plaintiff's statement was made on a section of the form asking about social activities. In contrast, plaintiff had stated on the application that the work effect of his disabilities was that he "could no longer commute" to work and "had to work from home." One permissible interpretation of plaintiff's statements was that he was able to endure the pain related to using the telephone and computer for work purposes, particularly as it was necessary to maintaining his job with the accommodation of working at home, but could not tolerate further pain from social, optional activities.

Finan v. Good Earth Tools, Inc., 565 F.3d 1076 (8th Cir. 2009). The court ruled that plaintiff, a former traveling salesman who had been diagnosed with epilepsy, had sufficiently explained any apparent contradiction between his Social Security and ADA claims by showing that the Social Security Administration had not found him incapable of performing the essential functions of his job, but rather that there were not a significant number of jobs in the national economy for someone with his age, education, work experience, and residual functional capacity; and although he was disabled for Social Security purposes after February 9, 2004, he was not disabled prior to his termination.

EEOC v. AutoZone, Inc., 2009 WL 464574 (C.D. Ill. Feb. 23, 2009). Denying an employer's motion for leave to file an amended answer alleging an additional defense of judicial estoppel, the court held that because the EEOC pursues the public interest rather than acting as a mere proxy for the charging party, the EEOC is not estopped from contending that a charging party was qualified notwithstanding the Social Security Administration's finding that his "sub-optimally controlled depression" left him effectively disabled, and his statements in his SSDI application that he had been unable to work since September 13, 2003, due to severe impairments, including depression, myofascial pain, degenerative disc disease of the spine, obesity, and obstructive sleep apnea.

Bitsas v. Dept. of State, EEOC Appeal No. 0120051657 (Sept. 30, 2009). Agency violated Rehabilitation Act when it did not select applicant -- whom it regarded as an individual with a disability based on past psychiatric diagnoses -- for a junior foreign service officer position because it deemed him only able to serve in locations where he would have access to an English-speaking therapist, and thus not "worldwide available." The Commission ruled that even assuming worldwide availability was an essential function of the position, complainant had the capacity to obtain any necessary treatment while abroad in any post due to his fluency in many languages. Moreover, the agency did not demonstrate based on an individualized assessment of objective information that complainant would pose a direct threat to safety.

III. Disparate Treatment

Carmona v. Southwest Airlines Co., __ F.3d __, 2010 WL 1010592 (5th Cir. March 22, 2010). Reinstating a jury verdict for plaintiff on his ADA discrimination claim that supervisors subjected him to harsher discipline for disability-related absences than co-workers with the same number of non-disability related absences, and ultimately terminated him, the court ruled: "All things considered, a reasonable jury could properly infer that, when Carmona's record eventually indicated that he had exceeded twelve points, his supervisors jumped at the chance to terminate him and did everything they could to ensure that his points would still exceed twelve after his pre-termination review, even though leniency had been granted to similarly-situated employees who were not disabled."

Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th Cir. 2010). Plaintiff alleged she was discharged because she was regarded as disabled notwithstanding her ability to perform the essential functions of her job. She prevailed at trial, but the jury found on a special verdict form that the employer terminated her due to its perception she was substantially limited in walking or standing but also that the employer would have discharged her anyway. The district court interpreted the jury's answers as a mixed-motive finding, and imposed liability as well as declaratory and injunctive relief but no damages, in accordance with Title VII's mixed-motive provisions. Vacating the judgment for plaintiff, the appellate court held that unlike Title VII, the ADA does not allow mixed-motive claims because it has no explicit mixed-motive liability provision, and it only cross-references the remedies provisions of Title VII. "Like the ADEA, the ADA renders employers liable for employment decisions made 'because of' a person's disability, and *Gross* [*v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009)] construes 'because of' to require a showing of but-for causation." The court left open the question of whether it would reach a different result in a case that arose after the effective date of the ADA Amendments Act, which among other revisions modified the ADA to prohibit discriminating against an individual "on the basis of" disability. 42 U.S.C. Sec. 12112(a).

Sensing v. Outback Steakhouse of Fla., L.L.C., 575 F.3d 145 (1st Cir. 2009). Reversing summary judgment for the employer, the court held that a jury could find that the employer's asserted reason for plaintiff's termination was a pretext for disability discrimination under Massachusetts state law. Plaintiff, whose duties required her to prepare take-out orders and deliver them to customers' cars, was granted a month's medical leave for a multiple sclerosis flare up, and returned to work on light duty. She eventually returned to her regular duties, but

soon thereafter experienced an incident in which she could not feel her legs and went home based on her supervisor's recommendation. Plaintiff was later again released to return to work without restrictions, but before she could do so, her supervisor instructed her to stay home because he was "not comfortable" with her return to work given potential "liability." Plaintiff's supervisor refused to place her on the schedule unless she underwent an independent medical evaluation (IME), though he said that he might schedule her for light duty in the meanwhile. Because light duty paid only about half as much as plaintiff's regular duties, plaintiff filed for unemployment insurance. Plaintiff's supervisor stated that, after plaintiff failed to contact him for several days, he concluded that she had abandoned her job. The court concluded that based on the employer's failure to schedule an IME, the employer's concern about potential liability, and the employer's refusal to allow plaintiff to return to regular duties despite a full release, plaintiff had created a triable issue of fact as to whether the employer had a legitimate, nondiscriminatory reason for removing her from the work schedule.

EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606 (5th Cir. 2009). EEOC brought suit on behalf of Lauren Netterville, a former administrative assistant who was denied a reasonable accommodation for chronic fatigue syndrome (CFS) and subsequently terminated. When Netterville was hired as a permanent employee in April 2001, she filled out a medical questionnaire, which did not include any questions about CFS. Netterville had not experienced any CFS-related symptoms for many years and did not disclose on the questionnaire that she had previously been diagnosed with the condition. In January 2003, Netterville experienced a recurrence of her CFS and was granted two weeks of leave in response to an accommodation request. Netterville's supervisor asked her how long she had been experiencing symptoms, and she mistakenly replied that it had been two years, which would have preceded her being hired as a permanent employee. Netterville subsequently explained that her symptoms recurred after she completed the questionnaire, but the employer concluded that she had falsified information on the questionnaire and terminated her. Reversing summary judgment for the employer, the court held that a reasonable jury could find that the employer's asserted reason for terminating Netterville was a pretext for disability discrimination. A jury could find that the employer's reaction to Netterville's request for accommodation -- to investigate whether answers on her medical questionnaire were false and would warrant termination -- was inconsistent with the company's standard operating procedure, which often imposed progressive discipline for workplace offenses. While the employer had terminated another employee for falsifying a medical questionnaire, that employee had purposely misled the employer by failing to disclose a medical condition that she knew she currently had. A reasonable jury could find that Netterville, by contrast, had answered the questionnaire truthfully. Finally, a jury could find that the employer knew or should have known that CFS is not a "blood condition," and that it was thus pretextual for the employer to have terminated Netterville based on a negative response to a question about whether she had anemia or any other blood condition. (*See also discussion of this case on page 11*.)

Willnerd v. First Nat'l Neb., Inc., 558 F.3d 770 (8th Cir. 2009). Plaintiff was working as a loan officer/sales representative when, in 1999, he began experiencing speech limitations due to an impairment. By 2001, his voice was limited to a whisper. Although his position required substantial interaction with the public, he did not request an accommodation and continued to perform satisfactorily in his job, as indicated by his performance reviews. In 2003, the employer

terminated plaintiff because he was allegedly underperforming. Plaintiff subsequently applied for 22 other positions but was not hired. Reversing summary judgment for the employer, the court held that there were disputed questions of material fact as to the employer's asserted legitimate, nondiscriminatory reasons for firing, and then for failing to rehire, plaintiff precluded summary judgment. The evidence showed that the employer imposed a production quota exclusively on plaintiff, which reasonable jurors could view as unattainable, that the employer made inconsistent statements regarding whether it considered other employees for termination, that other employees were performing poorly and were not subject to quotas or ultimately fired, and that one supervisor admitted that he was concerned about how customers perceived plaintiff as a result of his voice limitations. Evidence that the employer presented inconsistent accounts of plaintiff's abilities and of statements he had made regarding his ability to perform certain jobs and salaries he would consider also undermined the employer's purported reason for failing to rehire plaintiff.

IV. Reasonable Accommodation

Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010). Reversing summary judgment for the employer on a denial of accommodation claim, the court ruled that an employee who was blind in one eye may have been improperly denied her request for a shift change to accommodate her difficulty driving at night. "[W]e hold that the ADA contemplates that employers may need to make reasonable shift changes in order to accommodate a disabled employee's disability-related difficulties in getting to work." Rejecting Rite Aid's argument that it was not required to accommodate an employee's disability-related difficulty commuting because it "falls outside the work environment," the court noted that the statute expressly provides "part-time or modified work schedules" can be a reasonable accommodation, and the legislative history specifically cited the example of "persons who may require modified work schedules are persons with mobility impairments who depend on a transportation system that is not currently fully accessible." The court reasoned: "Thus, the ADA does not strictly limit the breadth of reasonable accommodations to address only those problems that the employee has in performing her work that arise once she arrives in the workplace . . . We therefore hold that under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable. One such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an employer's control and that would allow the employee to get to work and perform her job. *See* 29 C.F.R. § 1630.2(o)(1)(ii)-(iii) (defining reasonable accommodations to include '[m]odifications or adjustments to the work environment, or to the manner or circumstances under which [a] position… is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position . . . [and] [m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.') A change in shifts could be that kind of accommodation."

Gratzl v. Office of the Chief Judges of the 12th, 18th, 19th, and 22nd Judicial Circuits, 601 F.3d 674 (7th Cir. 2010). Plaintiff, a court reporter specialist with incontinence, had managed her need for access to a restroom at a moment's notice by obtaining an assignment to a position

in the courthouse control room rather than doing in-court reporting. When the state restructured the court reporter position and began requiring all reporters to do a full rotation through all courtrooms as well as the control room -- in order to more evenly distribute workload -- she requested as an accommodation that she be excused from rotating and instead be assigned solely to the control room. Her doctor advised that she needed to be able to reach a restroom within 5 minutes of feeling the urge to urinate. She was terminated after she rejected a series of offers of accommodation by the court, including: assigning her solely to juvenile courtrooms (which had no jury trials); assigning her only to courtrooms that had adjacent restrooms; excusing her from any courtroom where a trial was scheduled; not assigning her to any juvenile courtrooms (which were further from the restrooms); and establishing a "high sign" that she could use to signal the presiding judge of her need for a restroom break. The court ruled that even assuming *arguendo* she was qualified, "it was still up to the [employer] -- not Gratzl -- to construct the accommodation," and the employer fulfilled that obligation when it offered various reasonable accommodations.

Blount v. Dept. of Homeland Security, EEOC Appeal No. 0720070010 (Oct. 21, 2009), request for reconsideration denied, EEOC Request No. 0520100148 (April 16, 2010). The Commission affirmed an AJ's finding that the agency improperly denied the accommodation request by an Immigration Status Verification Officer to telework part-time while undergoing rehabilitation following a stroke. Rejecting the agency's assertion that complainant was unable to access the agency's secure computer network from home, the AJ had cited more credible testimony to the contrary from an agency supervisor who worked in the same office albeit in a different chain of command.

Hamblin v. Dept. of Justice, EEOC Appeal No. 0720070041 (Sept. 3, 2009), request for reconsideration denied, EEOC Request No. 0520100012 (March 31, 2010). The Commission found that the agency improperly revoked absent undue hardship an early work schedule that had been granted to complainant for three years to accommodate her bipolar disorder, and that the revocation of the accommodation resulted in her termination for poor performance.

Edwards v. Peters, EEOC Appeal No. 0320080101 (June 23, 2009). Petitioner, an air traffic control specialist, was on leave for several years due to treatment for knee injuries, breast cancer, and treatment-related restrictions. During this period she submitted a series of amended return dates. She received a notice of proposed removal even though at the time she had submitted current medical documentation indicating that she could return to work on a date certain. The Commission ruled that the agency had failed to meet its burden of proof to show it would have posed an undue hardship to allow petitioner to return on the date indicated by her doctor, citing undisputed evidence that there were funded vacant equivalent positions the agency was not seeking to fill, and no explanation by the agency regarding the need for her to return from unpaid leave sooner.

EEOC v. Hibbing Taconite Co., 2010 WL 2265153 (D. Minn. June 2, 2010). Partially denying Hibbing's motion for summary judgment, the court ruled that EEOC could proceed to trial on behalf of a hearing impaired applicant who was denied jobs in an open pit mine, but ruled for the employer with respect to jobs in its processing plant, since the applicant conceded in his interviews that he could not work in a very noisy plant environment. With respect to the open pit

mine jobs, the court ruled that real-time two-way communication was an essential function of the entry-level mine pit positions at issue, but the applicant may have been able to perform the jobs with accommodation. The court emphasized that the fact that he had worked successfully in another open mine for nine years performing various duties, and was able to communicate with limited radio use, hand signals, eye contact, horn use, and written communications, was "strong evidence that a reasonable accommodation could have been possible" by Hibbing.

Stewart v. St. Elizabeths Hosp., 589 F.3d 1305 (D.C. Cir. 2010). Affirming judgment for the employer as to plaintiff's October 2002 request for a reasonable accommodation, the court concluded that the administrator did everything legally required in promptly scheduling a meeting and offering to help once sufficient medical documentation was provided. In response to plaintiff's request for a transfer because she did not "feel that well," the hospital administrator made an appointment to discuss the request and asked plaintiff to provide medical documentation of any disability. At the meeting, plaintiff failed to provide the requested medical documentation, and was told by the administrator that he would try to assist her as soon as she submitted the necessary paperwork. Plaintiff left work early that day and never returned.

EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606 (5th Cir. 2009). Reversing summary judgment for the employer, the court held that there were genuine issues of material fact regarding the employer's response to two requests for reasonable accommodation that Lorin Netterville, an administrative assistant, sought upon returning from leave. The employer granted Netterville two weeks of leave that her doctor explained was needed because of a recurrence of chronic fatigue syndrome (CFS). At the end of the leave, Netterville presented the employer with a doctor's note releasing her to return to work but asking that the company relocate her to an office closer to her home (first release note). Netterville's supervisor refused. Netterville presented another doctor's note (second release note) two days later requesting that she be allowed to alternate job duties and take a short nap during her lunch break to alleviate symptoms. Netterville never received a response to this request and was fired shortly after returning to work. The court concluded that the first release note constituted a request for reasonable accommodation. While the note did not mention that Netterville required relocation because of her CFS and did not identify a location where Netterville could work, the employer knew Netterville had just taken medical leave for her CFS, and thus should have known that the accommodation related to this condition. Netterville had fulfilled her responsibility, and identification of a specific alternative work site should have been the subject of an interactive process. However, that process never occurred because the employer made no effort to explore the request. The court also concluded that a jury reasonably could find that the second release note constituted a request for reasonable accommodation and that, by ignoring the request, the employer refused the request and instead chose to fire her. (*See also discussion of this case on page 8.*)

Bowers v. Dept. of Defense, EEOC Appeal No. 0720070012 (March 22, 2010). Agency denied reasonable accommodation to personnel security specialist with left hand deformity when it denied her further available accommodations after being put on notice that the one-handed keyboard she had obtained through the CAP program was not sufficient to enable her to meet production standards for her position.

McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92 (2d Cir. 2009). Plaintiff worked in a manufacturing plant exposed to chemical fumes. After a one-year leave of absence to treat respiratory ailments and anxiety attacks brought on by exposure to fumes, her doctor cleared her to return to work if she was not exposed to the fumes. The company offered to provide her with a respirator, but she turned it down, and no other accommodations were discussed. The company terminated plaintiff for exhausting her leave and being unable to return to work. Affirming summary judgment for the employer on plaintiff's denial of accommodation claim, the court held that the employer's failure to have engaged in the interactive process was immaterial where there was no evidence of any reasonable accommodation that would have permitted plaintiff either to return to her pre-disability position or to be reassigned to a vacant position.

Ekstrand v. School Dist., 583 F.3d 972 (7th Cir. 2009). Reversing summary judgment for the employer as to plaintiff's reasonable accommodation claim, the court concluded that once a teacher with seasonal affective disorder provided medical documentation that she needed to be moved to a classroom with natural light, the employer would have had little problem accommodating the request. Prior to receiving medical documentation from plaintiff, the employer was not liable for failing to provide plaintiff with a classroom change as a reasonable accommodation based on her own conclusory remarks that natural light was necessary to accommodate her impairment. During this time period, plaintiff had identified various classroom conditions that exacerbated her seasonal depression, including lighting, noise, and air circulation, and the employer took accommodating steps to resolve each of these issues to avoid the costs of switching rooms. However, once plaintiff provided medical documentation of her need for natural light, the employer was obligated to provide the medically necessary accommodation absent undue hardship. Because there was evidence that plaintiff remained a qualified individual with a disability on the date that she finally provided the documentation concerning the need for natural light, and that there was an available accommodation, summary judgment on plaintiff's failure to accommodate claim was improper.

Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121 (1st Cir. 2009). Affirming a jury verdict for plaintiff, the court held that the employer failed to provide a reasonable accommodation to an insurance sales agent with bipolar disorder when it refused to assign him "mass marketing" accounts. These accounts were highly sought after because they involved access to a large volume of potential clients rather than requiring an agent to seek new business. The court found that this accommodation would have addressed plaintiff's difficulties meeting his sales quota. The court rejected the employer's argument that assigning these accounts to plaintiff would have been a change in his essential functions. Nor was the court persuaded that these accounts were assigned only as a perk to the highest performing agents. Even if that was true, reasonable accommodation could not be denied simply because plaintiff's disability prevented him from satisfying standard eligibility requirements for the benefit. Plaintiff requested these accounts specifically because his disability prevented him from meeting his sales quotas without access to a large volume of potential clients. The court also rejected the employer's argument that U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002), did not require it to make an exception to its established policy of assigning mass marketing accounts. Even if Barnett applied, "special circumstances" indicated that giving these accounts to plaintiff would not have upset any employee's expectations since the accounts had previously been assigned to new sales representatives as a means of jump-starting their business and to low-producing sales agents.

Furthermore, two managers testified that they had discretion to give these accounts to plaintiff but chose not to do so. Finally, while plaintiff may have had some difficulty handling these accounts due to his disability, other evidence showed that these accounts would have relied on his demonstrated strength in "closing the sale." Regardless, the employer denied him these accounts because it thought him undeserving and not because of a lack of competence.

EEOC v. Agro Distrib. LLC, 555 F.3d 462 (5th Cir. 2009). Plaintiff, a truck driver and manual laborer working in Mississippi, was born without sweat glands, and thus he needed to take breaks and cool himself with water or a fan when he became overheated. The employer had granted him such breaks, but when he instead asked to be excused from loading barrels on a truck, that request was refused. He then refused to show up for the assignment and was fired. Affirming summary judgment for the employer on a denial of accommodation claim, the court held that plaintiff failed to show why (1) this accommodation would no longer suffice, (2) he needed another form of accommodation, and (3) he was justified in refusing to show up for work because of his employer's refusal to would grant his preferred accommodation, i.e., excusing him from loading a truck. The court found that because plaintiff had refused to show up for work, there was no way of knowing whether the employer would have accommodated him by allowing him to take breaks as it had in the past. He presented no evidence that his disability had suddenly precluded any amount of lifting without his becoming ill, that the employer planned to deny him sufficient breaks the next day, or that this accommodation was no longer effective.

Brunker v. Schwan's Home Serv., Inc. 583 F.3d 1004 (7th Cir. 2009). Plaintiff, who made home deliveries for a food service, received an adequate reasonable accommodation for his dizzy spells when, rather than being placed on light duty as he requested, the company initially placed him on two months of disability leave and then, after receiving a note from plaintiff's doctor, returned plaintiff to work with a driver for one month so he could resume his delivery rounds. Affirming summary judgment for the employer, the court concluded that plaintiff was not entitled to his "ideal" accommodation of light duty given that the company provided effective, alternative accommodations.

Hennagir v. Utah Dep't of Corr., 587 F.3d 1255 (10th Cir. 2009). Affirming summary judgment for the employer, the court held that a correctional institution was not required, as a reasonable accommodation, to exempt a physician's assistant with disabilities from meeting its new essential function of completing emergency response training. While reasonable accommodation may include job restructuring, removal of an essential function is not required. Changing the title of plaintiff's position to avoid the new requirement also was not required as that likewise amounted to removal of an essential function.

Peyton v. Fred's Stores of Arkansas, Inc., 561 F.3d 900 (8th Cir. 2009). Affirming summary judgment for the employer, the court held that a recently hired store manager who required immediate surgery for ovarian cancer essentially requested indefinite leave since she was unable to provide an estimate of when she could return to work. Her doctor's letter stated that a return date was "unknown," and when a store representative spoke to plaintiff after she got out of surgery, plaintiff stated she had no idea how long she would be out. Two days later she was fired. Emphasizing that plaintiff clearly was not qualified to perform the essential functions with or without reasonable accommodation on the day she was fired, the court noted that plaintiff was

requesting indefinite leave since she admitted that on the day she was fired she had no idea when, if ever, she could return to work. The court also rejected an argument that the employer should have waited to determine the full extent of plaintiff's diagnosis, treatment, and recovery before deciding to terminate her, reasoning that "employers should not be burdened with guess-work regarding an employee's return to work after an illness."

V. Undue Hardship Defense

Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121 (1st Cir. 2009). Affirming a jury verdict for plaintiff, the court held that the employer failed to show that assigning an insurance sales agent "mass marketing" accounts would cause an undue hardship. The court found that this accommodation would have addressed plaintiff's difficulties in meeting his sales quota due to his bipolar disorder. The court rejected the employer's argument that assigning these accounts to plaintiff could jeopardize its relationship with an important client. Although there was testimony that assigning plaintiff to one particular mass marketing account may have imposed an undue risk, the court ruled that the evidence showed other accounts were relatively easy to handle, and poor matches between a sales agent and a client could be addressed by reassigning personnel. (*See also discussion of this case on pages 12-13.*)

Cruzan v. Dept. of Defense, EEOC Appeal No. 0120071893 (August 15, 2008), and **Long v. Dept. of Defense,** EEOC Appeal No. 0120071575 (April 3, 2009). Agency failed to show it would pose an undue hardship to provide sign language interpreter support to enable deaf employees to perform assignments in Iraq and Qatar.

VI. Direct Threat Defense

Lizotte v. Dacotah Bank, 677 F. Supp. 2d 1155 (D.N.D. 2010). Plaintiff, a loan officer with a mood disorder, was involuntarily hospitalized for four days following a suicide attempt. He was released to work without restrictions, but the employer terminated him without further investigation, citing concerns about "safety," "reputation," "liability," "customer acceptance," and the employer's image. Denying summary judgment for the employer on a discriminatory termination claim, the court cited, among other things, the employer's concern about image and the market president's statement that he was "blown away" that someone who had attempted suicide had been released so quickly and was not in jail. The court ruled that such evidence raised a question of fact as to whether the employer's concerns were based on myths, fears, or stereotypes about depression, as opposed to legitimate safety concerns, and further ruled that there seemed to be "little question" that plaintiff was qualified to perform the essential functions of the job, and did not pose a direct threat to safety.

EEOC v. Burlington N. & Santa Fe Ry. Co., 621 F. Supp. 2d 587 (W.D. Tenn. 2009). The employer refused to allow a train conductor to return from medical leave, because the lower portion of his right leg had been replaced by a prosthetic limb. Although the employee's own doctor released him to work without restrictions, the employer's doctors determined that he would pose a direct threat due to his lack of proprioception, which is the ability to sense the

position of a body part without looking at it. The court found that the employer had not shielded itself from liability by relying on its doctors. Those doctors had never examined the employee, and moreover, a question of fact existed as to whether the employee posed a direct threat, because the employer's doctors did not perform the type of "individualized assessment" required by the ADA and because there was conflicting medical evidence.

Bodenstab v. County of Cook, 569 F.3d 651 (7th Cir. 2009), cert. denied, 130 S. Ct. 1059 (2010). An anesthesiologist diagnosed with paranoia and narcissistic personality traits told his friend that if his cancer metastasized, he would kill his supervisor and certain coworkers. After the friend notified the employer about these remarks, the employer suspended plaintiff and ultimately terminated him. Affirming summary judgment for the employer, the court found it unnecessary to reach the question of whether plaintiff posed a direct threat to the health and safety of others in the workplace, ruling that plaintiff's threats alone were a legitimate, nondiscriminatory reason to terminate him and that he had failed to offer any evidence of pretext.

Onken v. McNeilus Truck & Mfg., Inc., 639 F. Supp. 2d 966 (N.D. Iowa 2009). Plaintiff, whose Type I diabetes caused him to have approximately one low blood sugar episode per week, was terminated from his welding job at a truck manufacturing plant. The court held that the employer had successfully established that plaintiff posed a direct threat because during low blood sugar episodes, plaintiff sometimes lost consciousness; became confused and incoherent; staggered near dangerous machinery; physically and verbally threatened his coworkers; and engaged in risky behavior such as running on the plant floor and swinging from a hook suspended from a crane. The employer had provided several accommodations to plaintiff so that he could control his blood sugar, but none removed the threat, because plaintiff lacked the ability to predict the episodes and to respond appropriately to them.

Jakubowski v. Christ Hosp., 2009 WL 2407766 (S.D. Ohio Aug. 3, 2009). A doctor with Asperger's Syndrome was removed from the employer's Family Medical Residency Program for communicating poorly with nurses, having difficulty communicating on the phone, getting "stuck" on a single diagnosis, and giving dangerous orders, among other reasons. Granting summary judgment to the employer, the court ruled that the employee was not "otherwise qualified" because his communication problems posed a direct threat "in the context of the medical work he [sought] to perform. The very nature of the medical profession requires solid communication skills with patients; fundamental problems with such communication make likely the potential of harm to the health or safety of others."

VII. Job-Related and Consistent with Business Necessity

Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850 (9th Cir. 2009). The employer refused to administer its own required annual respirator certification test to plaintiff because of high blood pressure caused by his Type 2 diabetes, and then argued that failure to meet this requirement meant plaintiff was not qualified. Vacating summary judgment for the employer, the court ruled that the employer had not shown as a matter of law that an annual respirator certification test was job-related and consistent with business necessity for a welding metallurgy specialist, especially since plaintiff stated that in 23 years he had never

needed to use a respirator. Furthermore, the court rejected the employer's claim that OSHA required use of this specific test every year, finding instead that OSHA's regulations were sufficiently broad to allow the employer to determine how to evaluate an employee's ability to use a respirator. The employer failed to show either that it needed to use the particular test at issue or that no other tests were appropriate for a person with high blood pressure. Finally, the employer had not shown that using an alternative test would cause an undue hardship.

Allmond v. Akal Sec., Inc., 558 F.3d 1312 (11th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 1139 (2010). Affirming summary judgment for the employer, the court held that a ban on using a hearing aid during a hearing test administered to applicants for court security officer positions with the United States Marshal's Service was job-related and consistent with business necessity under the ADA and the Rehabilitation Act. While the court recognized that the business necessity defense places a high burden on employers, that burden is "significantly lowered" when a position requires a high degree of skill and the risks of hiring an unqualified individual are great. The ban was clearly job related as the government had commissioned a detailed analysis that identified the need for a certain level of unaided hearing to perform the essential functions of a security officer position, including not only face-to-face communication but the ability to localize sound to identify any threats and to hear over the telephone, the radio, and outside the range of sight. Although the Marshal's Service permitted security officers to wear hearing aids while performing their jobs, officers were required to be able to work without them in case a hearing aid experienced interference, became dislodged, or broke. The court held that given the substantial harm that could occur if an officer suddenly could not use his hearing aid, the ban met business necessity, and there was no reasonable accommodation available.

Bates v. Dura Automotive Sys., Inc., 650 F. Supp. 2d 754 (M.D. Tenn. 2009). Employer instituted a drug screening program, and refused to allow anyone testing positive for drugs that carried a warning about the operation of equipment or impaired mental alertness to work in its factory. Analyzing the case under the ADA's qualification standards provision, the court declined to grant summary judgment to either party, holding that a jury reasonably could conclude that the policy was not consistent with business necessity because it inflexibly excluded individuals without considering individualized circumstances or that it was consistent with business necessity because the employer had "ample discretion" as to how to structure medical screenings related to workplace safety.

VIII. Employee Misconduct

Budde v. Kane County Forest Pres., 597 F.3d 860 (7th Cir. 2010). A police chief, who was terminated for driving while intoxicated off the job, alleged discrimination based on alcoholism. The termination occurred after his license was suspended, but before he was convicted of a DUI. The court affirmed summary judgment for the employer, holding that a plaintiff may be terminated for violating a universally applied workplace rule even if the violation was caused by a disability, that an employer need not wait for the result of a criminal proceeding regarding alleged misconduct before imposing discipline, and that plaintiff was not qualified for his job because he violated workplace rules and because he did not have a driver's license, which was required for a police chief position's essential function of driving.

IX. Disability-Related Inquiries and Medical Exams

Scott v. Napolitano, ___ F. Supp. 2d ___, 2010 WL 1797032 (S.D. Cal. May 3, 2010). Granting partial summary judgment for plaintiff, the court ruled that the Dept. of Homeland Security violated the Rehabilitation Act when it subjected plaintiff, a Federal Protective Service criminal investigator, to disability-related inquiries that were not job-related and consistent with business necessity because they went beyond -- in scope and in time -- what was necessary to determine whether he could safely perform the essential functions of his job. The questions sought unlimited information about past and present illnesses, medical treatments, and medications.

Harrison v. Benchmark Electronics Huntsville, Inc., 593 F.3d 1206 (11th Cir. 2010). Plaintiff, who had been placed by an agency to work at BEHI as a temporary employee, submitted an application for a permanent position with BEHI and consented to a drug test. After plaintiff's supervisor at BEHI informed him that he tested positive for barbiturates, plaintiff responded that he had a prescription. The supervisor then had plaintiff speak to the Medical Review Officer (MRO) on the phone, who asked plaintiff a series of questions about how long he had been disabled, what medication he took, and how long he had been taking it. In the supervisor's presence, plaintiff responded that he had had epilepsy since he was two years old and took barbiturates to control it. Human resources was subsequently notified that plaintiff's drug test had been cleared, but plaintiff's supervisor declined to hire him as a permanent employee and asked the temporary agency not to return him to BEHI because he had a performance and attitude problem. Plaintiff filed suit alleging that BEHI made an improper medical inquiry and failed to hire him because it regarded him as disabled. Reversing summary judgment for the employer, the court held that plaintiff could bring an ADA claim for a prohibited medical inquiry even though he was not disabled. While the district court correctly concluded that employers may conduct follow-up questioning in response to a positive drug test, it failed to acknowledge any limits on this type of questioning. Accordingly, the appeals court held that a reasonable jury could infer that the follow-up questions exceeded the permissible scope and that the supervisor's presence in the room "was an intentional attempt likely to elicit information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries."

James v. Goodyear Tire & Rubber Co., 2009 WL 4407813 (6th Cir. Dec. 3, 2009) (unpublished). Plaintiff, whose job in a tire manufacturing plant required physical strength, dexterity, and tolerance of high temperatures, began as a result of his multiple sclerosis to have noticeable difficulty with his mobility, gait, balance, sitting for long periods, working in high heat; and spasticity in his legs. Despite plaintiff's 15 years of good service and a clean safety record, union representatives and coworkers began to report that plaintiff was experiencing difficulty while working. Specifically, it was reported that plaintiff held on to machinery while climbing up and down stairs, that he needed the assistance of other employees to perform tasks that required climbing stairs and ladders, and that coworkers drove him to and from his workstation. At least one employee expressed concern that plaintiff could be injured by a passing forklift because of his trouble maneuvering. The court found that these difficulties

created a sufficient basis for the employer to conclude that plaintiff could not perform his job safely so as to justify a mandatory functional capacity evaluation.

Indergard v. Georgia-Pacific Corp., 582 F.3d 1049 (9th Cir. 2009). Plaintiff, a former paper mill worker, who began working for the employer in 1984, took medical leave in 2003 to undergo surgery for injuries to her knees. In 2005, her orthopedic surgeon authorized her to return to work with restrictions. Before allowing plaintiff to return, the employer required her to participate in a two-day physical capacity evaluation (PCE) conducted by an occupational therapist. Based on the results, which included a finding that plaintiff could not meet a 65-pound lifting requirement, the therapist recommended that she not return to work. The employer's orthopedic physician agreed with the assessment, and the employer informed plaintiff that she could not return. Citing the "seven-factor test" in EEOC's guidance on disability-related inquiries and medical examinations, the appellate court found that because the test constituted a medical exam rather than a mere functional capacity evaluation, because it measured plaintiff's blood pressure and heart rate and was conducted by a licensed occupational therapist who interpreted the results and recommended that plaintiff not return to work based on those results. Thus, the test went beyond collecting information necessary to determine whether plaintiff was capable of performing certain tasks. Rather, "the broad reach of the test was capable of revealing impairments of [plaintiff's] physical and mental health."

X. Confidentiality of Medical Information

Hamblin v. Dept. of Justice, EEOC Appeal No. 0720070041 (Sept. 3, 2009), request for reconsideration denied, EEOC Request No. 0520100012 (March 31, 2010). Agency accepted AJ's finding that it violated the Rehabilitation Act when it failed to maintain complainant's confidential medical information in a separate file from her official personnel file.

XI. Association with an Individual with a Disability

Erdman v. Nationwide Ins. Co., 582 F.3d 500 (3d Cir. 2009). Affirming summary judgment for the employer, the court held that plaintiff had failed to establish a prima facie case of discrimination under the ADA's association provision. After switching to full time at the employer's request, plaintiff requested leave for the month of August to prepare her daughter, who had Down syndrome, for school as she had done in the past while working on a part-time schedule. The employer informed plaintiff that she would not be able to take the time off, and she responded that she would seek FMLA leave in the alternative. Plaintiff was fired shortly thereafter, purportedly for behavioral problems. The court concluded that plaintiff could not show that her discharge was motivated by her request to take leave to care for her disabled child because there was no evidence that her discharge was motivated by the child's disability rather than by plaintiff's intention to miss work.

XII. Retaliation

Jacobs v. Marietta Mem'l Hosp., 2010 WL 749897 (S.D. Ohio Feb. 23, 2010). Plaintiff, who was Director of Staff and Organizational Development, requested the ability to work at home as a reasonable accommodation for her disability, bipolar disorder. Given evidence that plaintiff had performed satisfactorily when she had been permitted by a prior supervisor to work on occasion from her home, the issue of whether plaintiff's job required regular on-site attendance remained for resolution. Denying summary judgment to the employer as to plaintiff's retaliation claim, the court held that plaintiff's requested accommodation was not unreasonable as a matter of law and a factfinder had to decide whether plaintiff had a good-faith, objectively reasonable belief that she was entitled to the accommodation.

Sulima v. Tobyhanna Army Depot, 602 F.3d 177 (3d Cir. 2010). Affirming summary judgment for the Dept. of the Army on plaintiff's ADA claim that he was transferred and laid off in retaliation for his request to use the restroom more than usual due to the temporary side effects of a weight loss medication, the court ruled that plaintiff could not have had a reasonable, good faith belief that these side effects constituted a disability under the ADA.

7.7.10